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Sub-Commission on Prevention of
Discrimination and Protection
of Minorities
Forty-sixth session
Item 4 of the provisional agenda

REVIEW OF FURTHER DEVELOPMENTS IN FIELDS WITH WHICH THE SUB-COMMISSION HAS BEEN CONCERNED

Report of the Secretary-General prepared pursuant to Sub-Commission resolution 1993/29

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Introduction

1. In its resolution 1993/29, entitled "Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms", the Sub-Commission on Prevention of Discrimination and Protection of Minorities, having examined the study prepared by the Special Rapporteur, Mr. Theo van Boven, contained in his final report (E/CN.4/Sub.2/1993/8), and having noted with particular interest the conclusions and recommendations, as well as the proposed basic principles and guidelines contained therein, decided, inter alia, to examine further the proposed basic principles and guidelines included in the study at its forty-sixth session and for that purpose to establish, if necessary, a sessional working group at that session with a view to adopting a body of such principles and guidelines.

2. In paragraph 6, the Sub-Commission requested the Secretary-General to invite Governments and competent intergovernmental and non-governmental organizations to submit their comments on the proposed basic principles and guidelines included in the study. (The text of the proposed basic principles and guidelines is annexed to the present report.)

3. Pursuant to that resolution, the Secretary-General, on 19 January 1994, addressed requests to Governments and competent intergovernmental and non-governmental organizations for comments on the basic principles and guidelines included in the study of the Special Rapporteur.

4. By 1 June 1994, replies had been received from the following States: Armenia, Democratic People's Republic of Korea, Mexico, Nepal, Sweden and Uruguay. Bahrain indicated that it had no comments to submit.

5. Replies were also received from the International Criminal Police Organization (Interpol) and the League of Arab States as well as from the International Institute of Humanitarian Law and the World Organization against Torture.

6. The present report contains a summary of the substantive replies received concerning the proposed principles and guidelines. Any additional replies will be issued as addenda to this document.

7. The Secretary-General deems it appropriate to refer also to Commission on Human Rights resolution 1994/35 of 4 March 1994, in which the Commission, inter alia, expressed the hope that priority attention would be given to the question of restitution, compensation and rehabilitation for victims of gross violations of human rights and regarded the proposed basic principles and guidelines contained in the study of the Special Rapporteur a useful basis for this purpose. The Commission recommended to the Sub-Commission, in conformity with the latter's resolution 1993/29, to take measures to examine the proposed basic principles and guidelines with a view to making proposals thereon and to report to the Commission.

I. COMMENTS RECEIVED FROM STATES

A. Armenia

[Original: English/French]
[30 March 1994]

The Armenian Government wishes to inform the Special Rapporteur, Mr. Theo van Boven, of its interest in the question of the compensation of victims of gross violations of human rights. The Armenian parliament has given its attention to the problems of the victims of violations of human rights and has prepared a draft law, which is now under consideration in the parliament. We are forwarding the draft so that the Special Rapporteur can see for himself the way in which the parliament is tackling this subject.

Draft Law on Unfairly Convicted Persons

Republic of Armenia

Article 1

Citizens of the Republic of Armenia who were prosecuted for political motives, then discharged, are considered unfairly convicted persons.

Citizens who for the same reasons have been sentenced to death, imprisoned, deported or have been subjected to violence from State institutions according to verdicts of unconstitutional legal organs, are considered unconditionally as unfairly convicted persons.

Article 2

At the request of the repressed persons or their relatives, the mass media shall publish the name, date of birth, place of residence and the position occupied until having been convicted of the repressed person, as well as the body which convicted him/her, verdict of guilt, punishment and the dates of release and judgement of discharge.

Article 3

Military ranks, scientific degrees and other titles of the repressed persons (preserved in the Republic of Armenia) are restored, by application, by the corresponding competent juridical bodies of the Republic of Armenia.

Article 4

A period of imprisonment or exile, from the age of 14-years old, is considered as a period of working experience, increased three times, regardless of whether or not the convict had worked during the imprisonment or deportation.

If in the places mentioned a convict became disabled, he/she shall get a disability pension, regardless of the length of his/her working experience.

Article 5

Unfairly convicted persons who have lost their residence shall be provided land, according to determined standards for individual construction, as well as a long-term credit. Those persons do not pay the legalization fee for the privatization of their apartment.

Article 6

The unfairly convicted persons have the right to participate in the process of land privatization in their birthplace as members of the local community. If this is not possible, they have the right to a piece of land next to their residence.

Article 7

Participating in the privatization of industrial buildings or unfinished constructions, the unfairly convicted persons have the right to get additional certificates.

Article 8

The unfairly convicted persons shall not pay any fee for municipal and long-distance transportation.

B. Democratic People's Republic of Korea

[Original: English]
[29 March 1994]

1. Mr. Theo van Boven underlines in the general principles concerning reparation to victims of gross violations of human rights that States which have committed gross violations of human rights and crimes against humanity have a duty to investigate violations, take appropriate action against the violators and afford remedies to victims and that no person responsible for the gross violations shall have immunity from liability for his actions. He also puts forward the proposal for guarantees of non-repetition of the crimes and other comprehensive proposals for elimination of the violations of human rights and fundamental freedoms.

2. The Government of the Democratic People's Republic of Korea considers that these proposals assume an important legal and practical significance in eliminating crimes against humanity and other gross violations of human rights and preventing their repetition.

3. The international community still witnesses, on the threshold of the twenty-first century, the revival and repetition of the gross violations of human rights committed in the past and strongly feels that it is an evil consequence of the lack of legal and moral liquidation of the past crimes which has given rise to an ever-widening devastating impact as time passes, putting a brake on the world thrust towards a bright future and justice. This requires that the international community pay serious and urgent attention to the liquidation of the crimes against humanity committed in the past.

4. It is the view of the Government of the Democratic People's Republic of Korea that elimination of gross violations of human rights and crimes against humanity includes thorough investigation and disclosure of the crime, expression of sincere apology, punishment of the criminals and reparation to victims. Important here is how sincerely the State responsible for the gross violations manifests its political commitment to the world that it will liquidate its crimes and not repeat them.

5. The Government of the Democratic People's Republic of Korea considers that the proposed basic principles and guidelines are the ones that can be conducive to promotion of human rights and peace and security, and expresses its hope that the United Nations will pay particular attention to the proposals in accordance with resolution 1993/29 of the Sub-Commission. It urges the States responsible for gross violations of human rights to take practical steps for the implementation of the proposals.

C. Mexico

[Original: Spanish]
[23 March 1994]

1. On 1 February 1994 changes in Mexican legislation entered into force in several areas, relating to compensation for injury. The changes cover some aspects included in the draft under review, and Mexican legislation is consistent with the seven General Principles.

2. However, in the section on forms of reparations paragraph (c) refers to "Lost opportunities, including education;". This is not covered by Mexican legislation. Accordingly, it might be more appropriate, pending consideration of reforms along these lines, to amend paragraph (c) to read "Governments undertake to carry out the legal reforms necessary to cover lost opportunities, including education;".

3. With regard to section 11, paragraph (f), it is felt that commemorations and paying tribute to the victims of human rights violations would politicize the matter. The very fact of making the violation of an individual's human rights public may be considered as a personal recognition of the individual. In any event, the objective should be to ensure that the violation does not go unpunished and that the injury is compensated, which afford greater satisfaction to the injured party than a commemoration.

4. With regard to paragraph (h), subparagraph (iii), "Strengthening the independence of the judiciary;", it is a fact that there is need in Mexico for policies that will fully ensure the independence of the federal and local judiciary through:

Establishing new machinery for the appointment of members of the judiciary at the State level;

Working to establish the principle of the irremovability of judges at the federal and local levels; at present the safeguard is enjoyed only by the members of the Supreme Court.

Until domestic measures to that end have been taken, it is suggested that the subparagraph should read: "Adopting measures for strengthening the independence of the judiciary".

5. Regarding item 12 of the section on Procedures and Mechanisms, international law cannot be placed before internal law, unless the provisions have been expressly recognized by the Government of Mexico through the ratification of international instruments or acceptance of the competence of supranational organs. In the light of the foregoing, the following wording is suggested: "Every State party to human rights instruments which accepts the competence of supranational organs shall maintain prompt and effective disciplinary, administrative, civil and criminal procedures, with universal jurisdiction for human rights violations that constitute crimes under international law."

6. The following wording is suggested for the second part of item 15: "Claims relating to reparations for crimes against humanity shall not be subject to a statute of limitations".

D. Nepal

[Original: English]
[6 April 1994]

1. The Nepalese Constitution of 1990 has guaranteed against gross abuses of human rights and enshrined the principle of reparation for the victims of gross human rights violations. To make effective and strengthen this provision a bill of compensation for the victims of torture has been tabled at the last session of the Parliament. Certainly, this would be an act encompassing all the dimensions of the right to restitution, compensation and rehabilitation for the victims of gross violations of human rights and fundamental freedoms.

2. Nepal firmly supports and adheres to the proposed basic principles and guidelines submitted by the Special Rapporteur. Nepal has now been developing the practices and principles of human rights. Along with the institutional/legal reforms, traditional obstructions and impediments have to be overcome; modern values and principles have to be reinstated and obligations for the translation of these principles into real practices have to be fulfilled. Illiteracy, poverty, backwardness, paucity of modern infrastructures in the society have become the factors for obstruction of human rights and fundamental freedoms. Despite these obstructions and problems we have been making several endeavours and correctional practices to fulfil the international obligations for reaching the optimum level of satisfaction in human rights.

E. Sweden

[Original: English]
[20 April 1994]

1. The Government of Sweden would like to express its sincere appreciation of the thorough and considered report submitted by the Special Rapporteur,

Mr. van Boven, on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. The full implementation of human rights norms necessarily includes compliance with the obligation to provide reparation for any gross violations of those norms. It is clear that considerable efforts are necessary to ensure that the victims of gross violations of human rights receive the reparation to which they are entitled under international law. The proposed guidelines will undoubtedly clarify the different elements inherent in the right to reparation, as well as increase awareness of this right.

2. With regard to the specific principles and guidelines proposed by Mr. van Boven, the Swedish Government would like to make the following comments.

3. The principle of international law that accords the victims of violations of all human rights a right to reparation, constitutes the legal basis for any set of guidelines. Given that the proposed guidelines deal with reparation for gross violations of human rights, a clearer distinction could, however, be made between those fundamental tenets which are applicable to breaches of each and every human right (e.g. the first two sentences of principle 2, principle 3), and the principles dealing specifically with the consequences of gross violations of human rights. It might also be useful to clarify the implications of State responsibility for the provision of reparation, i.e. on which entities the obligation to provide reparation devolves.

4. Principle 4 states that "Reparation should respond to the needs and wishes of the victims". It is the view of the Swedish Government that the wishes of the victim, although an important factor to be taken into account when according reparation, should not in themselves be binding in the determination of that reparation. At the same time, no victim of human rights violations should be forced or coerced into accepting a form of reparation against his or her will.

5. The reference in principle 7 to collective claims and collective reparation should be interpreted in the light of the human rights norms to which the right to reparation is attached. The concept of human rights flows from the idea of inherent rights of each individual. The concepts of collective human rights contemplated in parts of the study have not as yet received general acceptance in the international community.

6. While aware that some legal systems allow for individual rights to be exercised collectively, and to result in collective claims, at present, the type of class action mentioned in principle 7 is not possible under Swedish procedural law.

7. Experience from attempts in international forums to determine the types of damage which merit compensation has shown that these concepts are assigned very different meanings in different legal systems. The list included in principle 9 may therefore come to be interpreted in a variety of ways under national law.

8. A recommendation such as that contained in principle 17 that all evidence should be made available should take into account the existence in many States of legal rules on confidentiality which are commensurate with human rights law.

9. Principle 18 lays down recommendations as to the forms of evidence which should be taken into account by tribunals responsible for affording reparations. In this context, it should be emphasized that such a recommendation must be commensurate with the principle of the independence of the judiciary. For instance, in Sweden, the basic rule on freedom of evidence leaves courts free to assess the relevance and value of evidence presented to them.

F. Uruguay

[Original: Spanish]
[11 April 1994]

1. The Government of the Republic of Uruguay attaches particular importance to the study ordered by the Sub-Commission and the objective of establishing safeguards for the effective exercise of victims' right to compensation. This in turn will preserve and increase Member States' confidence in the measures planned for the adoption and implementation of effective measures for strengthening the purposes and principles laid down in the Charter of the United Nations and the various international human rights instruments.

2. A State under the rule of law cannot dispense with the institution of the statute of limitations, and the Government would therefore like to propose a change in the drafting of the second sentence in paragraph 15.

3. Based on the foregoing, the Government proposes the following changes in the "Proposed Basic Principles and Guidelines":

(a) Paragraph 1:

"Under international law, the violation of human rights and/or fundamental freedoms gives rise to a right of reparation for the victim. Particular attention must be paid to gross violations of such rights and freedoms".

(b) Paragraph 15:

"Statutes of limitations shall not apply in respect of periods during which no effective remedies exist for human rights violations. Once the rule of law has been restored, claims relating to reparations for gross violations of human rights shall be subject to a reasonable period of limitation".

II. COMMENTS SUBMITTED BY INTERGOVERNMENTAL ORGANIZATIONS

A. Interpol

[Original: French]
[2 May 1994]

We wish to assure you that we attach great importance to the problems raised in this report, although our sphere of action relates to the subject only to a limited extent.

B. League of Arab States

[Original: Arabic]
[6 April 1994]

1. In his study, Mr. Theo van Boven emphasizes an important question: how to compel States to pay compensation (reparation) to individuals or collectivities whose rights have been violated? In fact, this constitutes the basis of the study, since most States usually reject any interference in their internal affairs to compel them to honour their obligation to compensate victims of violations. This confirms the need for a mechanism to supervise, carry out and monitor the process of equitable reparations for the victims, which would necessitate the conclusion of special conventions to which all States would have to accede on the understanding that they would incorporate in their domestic laws and legislation the provisions needed to ensure the achievement of that objective. This mechanism would have to be supervised by the United Nations, although the Human Rights Committee is regarded as incapable of playing this role. The final remarks are realistic and constructive in so far as the question of equitable treatment of the victims and assessment of the reparations due to them is usually viewed as a matter of only marginal concern. This has been confirmed by the rapporteurs of United Nations working groups considering questions relating to consistent patterns of gross violations of human rights and denials of fundamental freedoms, particularly when they are committed at the internal level and, as such, are not regarded as subject to reparations. We agree with the study's recommendation concerning the requirement to place maximum emphasis on the need to show greater national and international concern for the question of saving the victims of human rights violations by conducting further studies, preparing reports and establishing a fund for that purpose similar to the United Nations Voluntary Fund for Victims of Torture and the Voluntary Trust Fund on Contemporary Forms of Slavery. This was done with a view to ensuring compensation for the victims of gross violations of human rights and fundamental freedoms arising from the conflict between Iraq and Kuwait when the Security Council adopted resolution 687 (1991) on 3 April 1991 affirming Iraq's liability under international law for any direct loss or damage.

2. However, the study makes no reference to the question of the Israeli occupation, the gross violations of human rights in the occupied Arab territories, the Security Council resolutions adopted in this regard and the Fourth Geneva Convention of 1949. Since Israel has failed to implement the provisions of the Fourth Geneva Convention and other relevant international instruments, compensation and reparations should be payable, in accordance

with international law and conventions, in respect of the confiscation of property and houses, acts of torture, arbitrary detention and other forms of gross violations committed by the Israeli occupation forces against the Palestinian people. The aim of the study is to alleviate the sufferings of victims and ensure that they are treated equitably by making every possible endeavour to rectify or put an end to illegal acts and deter or prevent the occurrence of gross violations. This can be done only by establishing an international tribunal to protect and compensate the victims of gross violations of human rights.

3. The final proposals and recommendations confirm the need to compensate and make reparations to the victims of human rights violations. However, no clear indication is given as to how this can be achieved. We regard this as a vitally important requirement for the achievement of the declared purpose of that study in order to satisfy the aspirations of our peoples to a free and decent life.

III. COMMENTS SUBMITTED BY NON-GOVERNMENTAL ORGANIZATIONS

A. World Organization against Torture

[Original: French]
[28 March 1994]

1. Bearing in mind that the main problem for the victim is to establish responsibilities beyond a doubt, the World Organization against Torture proposes the establishment of a fund to compensate victims immediately when the damage has been duly verified and it has been possible to prove that the damage was due to the violation of a fundamental human right. The victim would be compensated promptly and the fund would then be able to turn to the State responsible in the territory and call upon it to ensure respect for human rights. The State could then demand compensation from the person directly responsible for the violation.

2. Some funds set up by governmental authorities now grant victims compensation without necessarily waiting until the perpetrators have been duly and conclusively identified and their criminal responsibility established in the criminal courts. This has been the case in Colombia, where several victims of violence have obtained compensation, notwithstanding the fact that the guilt and identity of the perpetrators has not yet been fully established.

3. It goes without saying that, were such a fund to be established, it should in no case be considered as an alternative to the duty of government authorities to seek out those responsible for violations and punish them according to the law.

Annex

PROPOSED BASIC PRINCIPLES AND GUIDELINES

General principles

1. Under international law, the violation of any human right gives rise to a right of reparation for the victim. Particular attention must be paid to gross violations of human rights and fundamental freedoms, which include at least the following: genocide; slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender.

2. Every State* has a duty to make reparation in case of a breach of the obligation under international law to respect and to ensure respect for human rights and fundamental freedoms. The obligation to ensure respect for human rights includes the duty to prevent violations, the duty to investigate violations, the duty to take appropriate action against the violators, and the duty to afford remedies to victims. States shall ensure that no person who may be responsible for gross violations of human rights shall have immunity from liability for their actions.

3. Reparation for human rights violations has the purpose of relieving the suffering of and affording justice to victims by removing or redressing to the extent possible the consequences of the wrongful acts and by preventing and deterring violations.

4. Reparation should respond to the needs and wishes of the victims. It shall be proportionate to the gravity of the violations and the resulting harm and shall include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

5. Reparation for certain gross violations of human rights that amount to crimes under international law includes a duty to prosecute and punish perpetrators. Impunity is in conflict with this principle.

6. Reparation may be claimed by the direct victims and, where appropriate, the immediate family, dependants or other persons having a special relationship to the direct victims.

7. In addition to providing reparation to individuals, States shall make adequate provision for groups of victims to bring collective claims and to obtain collective reparation. Special measures should be taken for the purpose of affording opportunities for self-development and advancement to groups who, as a result of human rights violations, were denied such opportunities.

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* Where these principles refer to States, they also apply, as appropriate to other entities exercising effective power.

Forms of reparations

8. Restitution shall be provided to re-establish, to the extent possible, the situation that existed for the victim prior to the violations of human rights. Restitution requires, inter alia, restoration of liberty, citizenship or residence, employment or property.

9. Compensation shall be provided for any economically assessable damage resulting from human rights violations, such as:

(a) Physical or mental harm;

(b) Pain, suffering and emotional distress;

(c) Lost opportunities, including education;

(d) Loss of earnings and earning capacity;

(e) Reasonable medical and other expenses of rehabilitation;

(f) Harm to property or business, including lost profits;

(g) Harm to reputation or dignity;

(h) Reasonable costs and fees of legal or expert assistance to obtain a remedy.

10. Rehabilitation shall be provided, to include legal, medical, psychological and other care and services, as well as measures to restore the dignity and reputation of the victims.

11. Satisfaction and guarantees of non-repetition shall be provided, including:

(a) Cessation of continuing violations;

(b) Verification of the facts and full and public disclosure of the truth;

(c) A declaratory judgement in favour of the victim;

(d) Apology, including public acknowledgment of the facts and acceptance of responsibility;

(e) Bringing to justice the persons responsible for the violations;

(f) Commemorations and paying tribute to the victims;

(g) Inclusion of an accurate record of human rights violations in educational curricula and materials;

(h) Preventing the recurrence of violations by such means as:

(i) Ensuring effective civilian control of military and security forces;

(ii) Restricting the jurisdiction of military tribunals;

(iii) Strengthening the independence of the judiciary;

(iv) Protecting the legal profession and human rights workers;

(v) Providing human rights training to all sectors of society, in particular to military and security forces and to law enforcement officials.

Procedures and mechanisms

12. Every State shall maintain prompt and effective disciplinary, administrative, civil and criminal procedures, with universal jurisdiction for human rights violations that constitute crimes under international law.

13. The legal system, especially in civil, administrative and procedural matters, must be adapted so as to ensure that the right to reparation is readily accessible, not unreasonably impaired and takes into account the potential vulnerability of the victims.

14. Every State shall make known, through the media and other appropriate mechanisms, the available procedures for reparations.

15. Statutes of limitations shall not apply in respect to periods during which no effective remedies exist for human rights violations. Claims relating to reparations for gross violations of human rights shall not be subject to a statute of limitations.

16. No one may be coerced to waive claims for reparations.

17. Every State shall make readily available all evidence in its possession concerning human rights violations.

18. Administrative or judicial tribunals responsible for affording reparations should take into account that records or other tangible evidence may be limited or unavailable. In the absence of other evidence, reparations should be based on the testimony of victims, family members, medical and mental health professionals.

19. Every State shall protect victims, their relatives and friends, and witnesses from intimidation and reprisals.

20. Decisions relating to reparations for victims of violations of human rights shall be implemented in a diligent and prompt manner. In this respect follow-up, appeal or review procedures should be devised.